

statutory time frame, unless the exceptions to this provision are met.⁷ (For a further discussion of section 6 of the OPEN Government Act, see Procedural Requirements, Time Limits, above.)

Fees

Congress charged OMB with the responsibility of providing a "uniform schedule of fees" for agencies to follow when promulgating their FOIA fee regulations.⁸ OMB did so in its Uniform Freedom of Information Act Fee Schedule and Guidelines [hereinafter OMB Fee Guidelines] issued in March 1987.⁹ Under the FOIA, each agency is required to publish regulations "specifying the schedule of fees" applicable to processing requests and must conform its schedule to the guidelines promulgated by OMB.¹⁰

The following discussion summarizes the FOIA's fee provisions.¹¹ The OMB Fee Guidelines,¹² which provide general principles for how agencies should set fee schedules and make fee determinations, and which include definitions of statutory fee terms, discuss these provisions in greater, authoritative detail. Anyone with a FOIA fee (as opposed to fee waiver) question should consult these guidelines in conjunction with the appropriate agency's FOIA regulations for the records at issue. Agency personnel should attempt to resolve such fee questions by consulting first with their FOIA officers. Whenever fee questions cannot be resolved in that way, agency FOIA officers should direct their questions to OMB's Office of Information and Regulatory Affairs, Information Policy Branch, at (202) 395-6466.

Requester Categories

The FOIA provides for three categories of requesters: commercial use requesters; educational institutions, noncommercial scientific institutions, and representatives of the news media; and finally, all requesters who do not fall within either of the preceding two categories.¹³ An agency's determination of the appropriate category for an individual requester is dependent upon the intended use of the information sought, and also, for some categories,

⁷ Id. § 6; see FOIA Post "OIP Guidance: New Limitations on Assessing Fees" (posted 11/18/08).

⁸ 5 U.S.C. § 552(a)(4)(A)(i) (2006), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524; see Envtl. Prot. Info. Ctr. v. U.S. Forest Serv., 432 F.3d 945, 947 (9th Cir. 2005) ("FOIA calls for the Office of Management and Budget to promulgate [fee] guidelines for agencies to follow.") (citation omitted); Media Access Project v. FCC, 883 F.2d 1063, 1069 (D.C. Cir. 1989) (rejecting plaintiff's claim that OMB's authority is limited to establishing "price list").

⁹ 52 Fed. Reg. 10,012 (Mar. 27, 1987).

¹⁰ 5 U.S.C. § 552(a)(4)(A)(i).

¹¹ See 5 U.S.C. § 552(a)(4)(A)(i)-(ii), (iv)-(vi), (viii).

¹² See 52 Fed. Reg. at 10,012.

¹³ See 5 U.S.C. § 552(a)(4)(A)(ii)(I)-(III) (2006), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524.

are encouraged to seek additional information or clarification from the requester when the intended use is not clear from the request itself.¹⁸

The second requester category consists of requesters who seek records for a noncommercial use and who qualify as one of three distinct subcategories of requesters: those who are affiliated with an educational institution, those who are part of a noncommercial scientific institution, and those who are representatives of the news media.¹⁹

The OMB Fee Guidelines define "educational institution" to include various schools, as well as institutions of higher learning and vocational education.²⁰ This definition is limited, however, by the requirement that the educational institution be one "which operates a program or programs of scholarly research."²¹ To qualify for inclusion in this fee subcategory, the request must serve a scholarly research goal of the institution, not an individual goal.²² Thus, a student seeking inclusion in this subcategory, who "makes a request in furtherance of the completion of a course of instruction is carrying out an individual research goal," and would not qualify as an educational institution requester.²³

The definition of a "noncommercial scientific institution" refers to a "noncommercial" institution that is "operated solely for the purpose of conducting scientific research the results of which are not intended to promote any particular product or industry."²⁴

¹⁷(...continued)

documents to contest union election results to be commercial use); cf. Hosp. & Physician Publ'g v. DOD, No. 98-CV-4117, 1999 WL 33582100, at *5 (S.D. Ill. June 22, 1999) (stating that requester's past commercial use of such records is not relevant to present case), remanded per joint stipulation, No. 99-3152 (7th Cir. Feb. 24, 2005) (remanding for purposes of adoption of parties' settlement agreement and dismissal of case).

¹⁸ See OMB Fee Guidelines, 52 Fed. Reg. at 10,018 (specifying that where "use is not clear from the request . . . agencies should seek additional clarification before assigning the request to a specific category"); see also McClellan, 835 F.2d at 1287 ("Legislative history and agency regulations imply that an agency may seek additional information when establishing a requester's category for fee assessment."); cf. Long v. DOJ, 450 F. Supp. 2d 42, 85 (D.D.C. 2006) (finding moot requester's challenge to agency's authority to request certain information in order to make fee category determination where no fee ultimately was assessed).

¹⁹ See 5 U.S.C. § 552(a)(4)(A)(ii)(II).

²⁰ See OMB Fee Guidelines, 52 Fed. Reg. at 10,018.

²¹ Id.; see Nat'l Sec. Archive v. DOD, 880 F.2d 1381, 1383-85 (D.C. Cir. 1989) (approving implementation of this standard in DOD regulation).

²² See OMB Fee Guidelines, 52 Fed. Reg. at 10,014 (distinguishing institutional from individual requests through use of examples).

²³ Id. at 10,014.

²⁴ Id. at 10,018.

As to the third type of requester in this category, "representative of the news media," Congress has now included a definition directly in the FOIA statute.²⁵ With the passage of the OPEN Government Act²⁶ and some twenty-one years after the term was first included in the statute,²⁷ Congress, borrowing from both the Court of Appeals for the District of Columbia Circuit's opinion in National Security Archive v. DOD²⁸ and the OMB Fee Guidelines²⁹ has now statutorily defined a "representative of the news media." This subcategory includes "any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience."³⁰ Additionally, Congress incorporated into the statutory definition the OMB Fee Guidelines' definition of "news" as "information that is about current events or that would be of current interest to the public."³¹ The new statutory definition also addresses the potential growth of alternative news media entities by providing a non-exclusive list of media entities.³² Finally, the statutory definition specifies that freelance journalists shall be considered representatives of the news media if they "can demonstrate a solid basis for expecting publication through [a news media] entity, whether or not the journalist is actually employed by the entity."³³

²⁵ OPEN Government Act of 2007, Pub. L. No. 110-175, § 3, 121 Stat. 2524.

²⁶ Pub. L. No. 110-175, 121 Stat. 2524.

²⁷ See Freedom of Information Reform Act of 1986, Pub. L. No. 90-570, §§ 1801-04, 100 Stat. 3207.

²⁸ 880 F.2d 1381, 1387 (D.C. Cir. 1989) (defining "representative of the news media").

²⁹ OMB Fee Guidelines, 52 Fed. Reg. at 10,018.

³⁰ OPEN Government Act § 3; see Nat'l Sec. Archive v. DOD, 880 F.2d at 1387 (defining representative of the news media as "a person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience"); see also Elec. Privacy Info. Ctr. v. DOD, 241 F. Supp. 2d 5, 14 (D.D.C. 2003) (explaining that fact that entity distributes its publication "via Internet to subscribers' email addresses does not change the [news media] analysis"); cf. Hall v. CIA, No. 04-00814, 2005 WL 850379, at *6 (D.D.C. Apr. 13, 2005) (finding organization's statement that "news media is pled," without mentioning specific activities in which it is engaged, "misstates the burden that a party . . . must carry . . . [o]therwise, every conceivable FOIA requester could simply declare itself a 'representative of the news media' to circumvent fees").

³¹ OPEN Government Act § 3; see also OMB Fee Guidelines, 52 Fed. Reg. at 10,018.

³² OPEN Government Act § 3 ("[e]xamples of news-media entities are television or radio stations broadcasting to the public at large and publishers of periodicals (but only if such entities qualify as disseminators of 'news') who make their products available for purchase by or subscription by or free distribution to the general public").

³³ OPEN Government Act § 3; see OMB Fee Guidelines, 52 Fed. Reg. at 10,018 (stating that for freelancers, publication contract with news organization would be "clearest" proof for
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Circuit's decision in National Security Archive v. DOD,³⁵ have held that the plaintiff organizations qualified for status as representatives of the news media.³⁶

The D.C. Circuit also held in National Security Archive that merely making the information received available to the public (or others) was not sufficient to qualify a requester for placement in this fee category.³⁷ Additionally, the same court noted that a request from

³⁴(...continued)

Nat'l Sec. Archive v. DOD, 880 F.3d 1381, 1387 (D.C. Cir. 1989) (noting that term "representative of the news media" excludes "private librar[ies]" or "private repositories" of government records or middlemen such as "information vendors [or] data brokers" who request records for use by others).

³⁵ 880 F.2d 1381 (D.C. Cir. 1989).

³⁶ See id. at 1387; see also Ctr. for Pub. Integrity v. HHS, No. 06-1818, 2007 WL 2248071, at *5 (D.D.C. Aug. 3, 2007) (finding that investigative reporting organization qualified as "representative of new media" under agency regulations and OMB Guidelines as it intended to use information sought as basis for articles and press releases, that its staff was comprised of investigative journalists, that information received would be posted in organization's newsletter, and that it had demonstrated its past journalistic efforts that "had garnered various awards"); Elec. Privacy Info. Ctr., 241 F. Supp. 2d at 9 (concluding that publication activities of public interest research center -- which included both print and other media -- satisfied definition of "representative of the news media" under agency's FOIA regulation); Judicial Watch, Inc. v. DOJ, 133 F. Supp. 2d 52, 53-54 (D.D.C. 2000) (finding that requester qualified as representative of news media, but observing that test for same that is set forth in National Security Archive did not "apparently anticipate[] the evolution of the Internet or the morphing of the 'news media' into its present indistinct form," thereby suggesting that under National Security Archive "arguably anyone with [a] website" could qualify for media status, and concluding that "if such a result is intolerable . . . the remedy lies with Congress"), appeal dismissed per curiam, No. 01-5019, 2001 WL 800022, at *1 (D.C. Cir. June 13, 2001) (ruling that "district court's order holding that appellee is a representative of the news media for purposes of [the FOIA] is not final in the traditional sense and does not meet requirements of the collateral order doctrine" for purposes of appeal); Hosp. & Physician Publ'g, 1999 WL 33582100, at *4 (finding that requester qualified under test of National Security Archive as a "representative of the news media"); cf. Tax Analysts v. DOJ, 965 F.2d 1092, 1095 (D.C. Cir. 1992) (noting that, in context of attorney fees, plaintiff "is certainly a news organization"); Nat'l Sec. Archive v. CIA, 564 F. Supp. 2d 29, 34-37 (D.D.C. 2008) (finding plaintiff's claim of entitlement to news media status under Nat'l Sec. Archive v. DOD moot where agency informed court that all future noncommercial FOIA requests submitted by plaintiff would be accorded news media status), subsequent opinion granting plaintiff's motion for reconsideration, 584 F. Supp. 2d 144, 147 (D.D.C. 2008) (holding that despite agency's recent assurances to court, agency's continued placement of plaintiff into a category other than "news media" is in violation of D.C. Circuit law, and issuing order that agency "must treat [plaintiff] as a representative of the news media for all pending and future noncommercial FOIA requests").

³⁷ See Nat'l Sec. Archive, 880 F.2d at 1386 (finding that "making information available to the
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even if the records located are subsequently determined to be exempt from disclosure.⁵⁹ The OMB Guidelines direct that searches for responsive records should be done in the "most efficient and least expensive manner."⁶⁰ The term "search" means locating records or information either "manually or by automated means"⁶¹ and requires agencies to expend "reasonable efforts" in electronic searches, if requested to do so by requesters willing to pay for that search activity.⁶²

The "review" costs which may be charged to commercial-use requesters consist of the "direct costs incurred during the initial examination of a document for the purposes of determining whether [it] must be disclosed [under the FOIA]."⁶³ Review time thus includes processing the documents for disclosure, i.e., doing all that is necessary to prepare them for release,⁶⁴ but it does not include time spent resolving general legal or policy issues regarding

⁵⁹ See *id.* at 10,019; see also TPS, Inc. v. Dep't of the Air Force, No. C 01-4284, 2003 U.S. Dist. LEXIS 10925, at *8-9 (N.D. Cal. Mar. 28, 2003) ("The fact that you did not receive any records from [the agency] . . . does not negate your responsibility to pay for programming services provided to you in good faith, at your request with your agreement to pay applicable fees." (quoting with approval exhibit to defendant's declaration)); Guzzino v. FBI, No. 95-1780, 1997 WL 22886, at *4 (D.D.C. Jan. 10, 1997) (upholding agency's assessment of search fees to conduct search for potentially responsive records within files of individuals "with names similar to" requester's when no files identifiable to requester were located), appeal dismissed for lack of prosecution, No. 97-5083 (D.C. Cir. Dec. 8, 1997); Linn v. DOJ, No. 92-1406, 1995 WL 417810, at *13 (D.D.C. June 6, 1995) (holding that there is no entitlement to refund of search fees when search unproductive).

⁶⁰ OMB Fee Guidelines, 52 Fed. Reg. at 10,017.

⁶¹ 5 U.S.C. § 552(a)(3)(D).

⁶² *Id.* at § 552(a)(3)(C); see also FOIA Update, Vol. XVIII, No. 1, at 6 ("OIP Guidance: Amendment Implementation Questions") (analyzing 1996 FOIA amendment that requires agencies to "make reasonable efforts" to search for records electronically); *cf.* OMB Fee Guidelines, 52 Fed. Reg. at 10,018, 10,019 (providing that agencies should charge "the actual direct cost of providing [computer searches]," but that for certain requester categories, cost equivalent of two hours of manual search is provided without charge).

⁶³ 5 U.S.C. § 552(a)(4)(A)(iv); see also Carney, 19 F.3d at 814 n.2 (noting that fee for document review is properly chargeable to commercial requesters); Gavin v. SEC, No. 04-4522, 2006 U.S. Dist. LEXIS 75227, at *17-18 (D. Minn. Oct. 13, 2006) (finding that agency's court-ordered initial review of documents was chargeable to commercial-use requester); OMB Fee Guidelines, 52 Fed. Reg. at 10,018 (clarifying that records "withheld under an exemption which is subsequently determined not to apply may be reviewed again to determine the applicability of other exemptions not previously considered" and, further, that "costs for such a subsequent review would be properly assessable").

⁶⁴ See OSHA Data, 220 F.3d at 168 (concluding that review fees include, in the context of business-submitted information, costs of mandatory predislosure notification to companies and evaluation of their responses by agency for purpose of determining applicability of
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the applicability of particular exemptions or reviewing on appeal exemptions that already are applied.⁶⁵ The OMB Fee Guidelines provide that records that have been withheld in full under a particular exemption that is later determined during administrative proceedings not to apply may be "reviewed again to determine the application of other exemptions not previously considered"⁶⁶ and review fees assessed accordingly.⁶⁷

Under the FOIA, "duplication" charges represent the reasonable "direct costs" of making copies of documents.⁶⁸ Copies can take various forms, including paper copies or machine-readable documentation.⁶⁹ As further required by the FOIA, agencies must honor a requester's choice of form or format if the record is "readily reproducible" in that form or format with "reasonable efforts" by the agency.⁷⁰

For paper copies, the OMB Fee Guidelines specifically require that agencies establish an "average agency-wide, per-page charge for paper copy reproduction."⁷¹ For non-paper copies, such as printouts, disks, or other electronic media, agencies should charge the actual costs of production of that medium.⁷² For any of these forms of duplication, agencies should consult with their technical support staff for assistance in determining their actual costs associated with producing the copies in the various media sought.⁷³

In addition to charging the costs provided by agency implementing regulations for

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exemption to companies' submitted business information).

⁶⁵ See OMB Fee Guidelines, 52 Fed. Reg. at 10,017, 10,018.

⁶⁶ Id. at 10,018. But see AutoAlliance Int'l v. U.S. Customs Serv., No. 02-72369, slip op. at 7-8 (E.D. Mich. July 31, 2003) (finding that where agency did not review all responsive documents during initial review -- and charged no fee -- it effectively waived agency's ability to charge commercial requester review fees for agency's "thorough review" conducted at administrative appeal level inasmuch as statute limits such fees to "initial examination" only).

⁶⁷ OMB Fee Guidelines, 52 Fed. Reg. at 10,018.

⁶⁸ 5 U.S.C. § 552(a)(4)(A)(iv); see OMB Fee Guidelines, 52 Fed. Reg. at 10,018.

⁶⁹ See OMB Fee Guidelines, 52 Fed. Reg. at 10,017.

⁷⁰ 5 U.S.C. § 552(a)(3)(B); see FOIA Update, Vol. XVIII, No. 1, at 5-6 ("OIP Guidance: Amendment Implementation Questions") (advising agencies on format disclosure obligations); FOIA Update, Vol. XVII, No. 4, at 2 ("Congress Enacts FOIA Amendments") (same).

⁷¹ See OMB Fee Guidelines, 52 Fed. Reg. at 10,017, 10,018 (detailing elements included in direct costs of duplication).

⁷² See id. at 10,018; FOIA Update, Vol. XI, No. 3, at 4 & n.25 ("Department of Justice Report on 'Electronic Record' FOIA Issues, Part II").

⁷³ See OMB Fee Guidelines at 10,017-18 (advising agencies to "charge the actual cost, including computer operator time, of production of [a computer] tape or printout").

together so that, except with respect to commercial-use requesters, agencies should not begin to assess fees until after they provide this amount of free search and duplication; the assessable fee for any requester then must be greater than the agency's cost to collect and process it in order for the fee actually to be charged.⁸²

Agencies also may not require a requester to make an advance payment, i.e., payment before work is begun or continued on a request, unless the agency first estimates that the assessable fee is likely to exceed \$250, or unless the requester has previously failed to pay a properly assessed fee in a timely manner (i.e., within thirty days of the billing date).⁸³ Estimated fees, though, are not intended to be used to discourage requesters from exercising their access rights under the FOIA.⁸⁴

The statutory restriction generally prohibiting a demand for advance payments does

⁸¹(...continued)

records), renewed motion for summary judgment granted to agency, No. 04-0769, 2006 WL 949918 (D.D.C. Apr. 12, 2006).

⁸² See 5 U.S.C. § 552(a)(4)(A)(iv)(I); OMB Fee Guidelines, 52 Fed. Reg. at 10,018; see, e.g., DOJ Fee Regulations, 28 C.F.R. § 16.11(d)(4) (establishing fee threshold below which no fee will be charged);.

⁸³ See 5 U.S.C. § 552(a)(4)(A)(v); OMB Fee Guidelines, 52 Fed. Reg. at 10,020; see also O'Meara v. IRS, No. 97-3383, 1998 WL 123984, at *1-2 (7th Cir. Mar. 17, 1998) (upholding agency's demand for advance payment when fees exceeded \$800); Antonelli v. ATF, 555 F. Supp. 2d 16, 23 (D.D.C. 2008) (stating that "under DOJ regulations, plaintiff's failure to pay fees to which he had agreed within 30 days of the billing date provided an adequate basis for defendant to require" advance payment); Brunsilus v. DOE, 514 F. Supp. 2d 30, 34-36 (D.D.C. 2007) (citing agency's regulation allowing collection of fees before processing when they exceed \$250 and concluding "request is not considered received until the payment is in the agency's possession"); Emory v. HUD, No. 05-00671, 2007 WL 641406, at *4 (D. Haw. Feb. 23, 2007) (same); Pietrangelo v. U.S. Dep't of the Army, No. 2:04-CV-44, slip op. at 14 (D. Vt. Mar. 7, 2005) ("Fees may be estimated by the agency and demanded in advance if the fee will exceed \$250."); Jeanes v. DOJ, 357 F. Supp. 2d 119, 123 (D.D.C. 2004) (citing agency's regulation requiring advance fee payment noting that "the request shall not be considered received and further work will not be done on it until required payment is received" (quoting 28 C.F.R. § 16.11(i)(4))); TPS, Inc., 2003 U.S. Dist. LEXIS 10925, at *8-9 (upholding agency's refusal to process further requests until all outstanding FOIA debts were paid), appeal dismissed voluntarily, No. 03-15950 (9th Cir. May 24, 2007)); Rothman v. Daschle, No. 96-5898, 1997 U.S. Dist. LEXIS 13009, at *2 (E.D. Pa. Aug. 20, 1997) (upholding agency's request for advance payment when fees exceeded \$250); Mason v. Bell, No. 78-719-A, slip op. at 1 (E.D. Va. May 16, 1979) (finding dismissal of FOIA case proper when plaintiffs failed to pay fees to other federal agencies for prior requests). But cf. Ruotolo v. DOJ, 53 F.3d 4, 9-10 (2d Cir. 1995) (suggesting that agency should have processed request up to amount offered by requesters rather than state that estimated cost "would greatly exceed" \$250 without providing an amount to be paid or offering assistance in reformulating request).

⁸⁴ See Hall v. CIA, No. 04-0814, 2006 WL 197462, at *3 & n.4 (D.D.C. Jan. 25, 2006) (recognizing that it would be improper for agencies to inflate fees to discourage requests).

Thus, when documents responsive to a FOIA request are maintained for distribution by an agency according to a statutorily based fee schedule, requesters should obtain the documents from that source and pay the applicable fees in accordance with the fee schedule of that other statute.⁸⁹ This may at times result in the assessment of fees that are higher than those that would otherwise be chargeable under the FOIA,⁹⁰ but it ensures that such fees are properly borne by the requester and not by the general public.⁹¹

The superseding of FOIA fees by the fee provisions of another statute raises a related question as to whether an agency with a statutorily based fee schedule for particular types of records is subject to the FOIA's fee waiver provision in those instances where it applies an alternate fee schedule.⁹² Although this question has been raised, it has not yet been explicitly decided by an appellate court.⁹³

⁸⁸(...continued)

government agency . . . to set the level of fees" and not one that simply allows it to do so (quoting OMB Fee Guidelines) (emphasis added)).

⁸⁹ See OMB Fee Guidelines, 52 Fed. Reg. at 10,012-13, 10,017-18 (implementing 5 U.S.C. § 552(a)(4)(A)(vi), and advising agencies to "inform requesters of the steps necessary to obtain records from those sources"); *id.* at 10,017 (contemplating "statutory-based fee schedule programs . . . such as the NTIS [National Technical Information Service]"); see also Wade v. Dep't of Commerce, No. 96-0717, slip op. at 5-6 (D.D.C. Mar. 26, 1998) (concluding that fee was "properly charged by NTIS" under its fee schedule). But see Envtl. Prot. Info. Ctr., 432 F.3d at 948-49 (holding that statute permitting agency to sell maps and Geospatial Information System data "at not less than the estimated [reproduction] cost," or allowing agency "to make other disposition of such . . . materials," was not "superseding fee statute" given discretionary nature of agency's authority to charge fees, and recognizing that court's decision "may be at odds" with D.C. Circuit's decision in Oglesby, 79 F.3d 1172).

⁹⁰ See, e.g., Wade, No. 96-0717, slip op. at 2, 6 (D.D.C. Mar. 26, 1998) (approving assessment of \$1300 fee pursuant to National Technical Information Service's superseding fee statute and noting cost of \$210 in anticipated FOIA fees).

⁹¹ See OMB Fee Guidelines, 52 Fed. Reg. at 10,017.

⁹² See Envtl. Prot. Info. Ctr., 432 F.3d at 946, 948 (recognizing FOIA's superseding fee provision as "exception to the fee waiver provision of the FOIA," but stating that statute in question did not qualify as a superseding fee statute).

⁹³ Compare Oglesby, 79 F.3d at 1178 (refusing to rule on plaintiff's argument that a superseding fee statute does not exempt agency from making FOIA fee waiver determination, because plaintiff failed to raise argument in timely manner), and Oglesby v. U.S. Dep't of the Army, 920 F.2d 57, 70 n.17 (D.C. Cir. 1990) (declining to reach fee waiver issue because plaintiff failed to exhaust administrative remedies), with Envtl. Prot. Info. Ctr., 432 F.3d at 946, 948 (recognizing FOIA's superseding fee provision as "exception to the fee waiver provision of the FOIA"), and St. Hilaire v. DOJ, No. 91-0078, slip op. at 4-5 (D.D.C. Sept. 10, 1991) (avoiding fee waiver issue because requested records were made publicly available), summary judgment granted to agency, (D.D.C. Mar. 18, 1992), aff'd per curiam, No. 92-5153

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two decades ago, courts did not generally define the "general public" to include the prison population.¹³⁸ Since then, however, the limited number of courts that have addressed this issue, have found prisoners to be the "public" within the meaning of the FOIA.¹³⁹ Only one case has directly addressed the issue of whether the "public" encompasses only the population of the United States.¹⁴⁰ In that case the court held that disclosure to a foreign news syndicate that published only in Canada satisfied the requirement that it contribute to "public understanding."¹⁴¹

As the proper focus must be on the benefit to be derived by the public, any personal benefit to be derived by the requester, or the requester's particular financial situation, are not considerations entitling him or her to a fee waiver.¹⁴² Indeed, it is well settled that indigence

¹³⁷(...continued)

will contribute to understanding of "reasonably broad audience of persons"); Fazzini v. DOJ, No. 90-C-3303, 1991 WL 74649, at *5 (N.D. Ill. May 2, 1991) (finding that requester cannot establish public benefit merely by alleging he has "corresponded" with members of media and intends to share requested information with them), summary affirmance granted, No. 91-2219 (7th Cir. July 26, 1991). But see FedCure, 602 F. Supp. 2d at 202-03 (rejecting agency's "small audience" argument, finding that plaintiff's dissemination to "federal inmates, their families and others," constitutes "sufficiently broad audience" interested in subject).

¹³⁸ See, e.g., Wagner v. DOJ, No. 86-5477, slip op. at 2 (D.C. Cir. Mar. 24, 1987) (stating that general public must benefit from release); Cox v. O'Brien, No. 86-1639, slip op. at 2 (D.D.C. Dec. 16, 1986) (upholding denial of fee waiver where prisoners, not general public, would be beneficiaries of release).

¹³⁹ See Ortloff v. DOJ, No. 98-2819, slip op. at 21 (D.D.C. Mar. 22, 2002) (stressing that to qualify for fee waiver, requester's ability to disseminate information "to the general public, or even to a limited segment of the public such as prisoners" must be demonstrated); Linn v. DOJ, No. 92-1406, 1995 WL 631847, at *14 (D.D.C. Aug. 22, 1995) (rejecting agency's position that dissemination to prison population is not to public at large; statute makes no distinction between incarcerated and nonincarcerated public).

¹⁴⁰ See Southam News v. INS, 674 F. Supp. 881 (D.D.C. 1987).

¹⁴¹ Id. at 892-93; cf. Edmonds Inst. v. U.S. Dep't of Interior, 460 F. Supp. 2d 63, 74 n.7 (D.D.C. 2006) (refraining from addressing agency's claim that meaning of "public" for fee waiver purposes "does not include members of the international community" given that there were sufficient number of U.S.-based organizations involved in supporting request before agency).

¹⁴² See, e.g., Carney, 19 F.3d at 816 (finding fee waiver inappropriate for portion of responsive records that concerned processing of plaintiff's own FOIA requests); McClain v. DOJ, 13 F.3d 220, 220-21 (7th Cir. 1993) (stating that fee waiver not merited when requester sought to serve private interest rather than "public understanding of operations or activities of the government"); Cotton v. Stine, No. 6:07-98, 2008 U.S. Dist. LEXIS 93149, at *1-2 (E.D. Ky. Nov. 14, 2008) (finding no indication of public benefit where prisoner sought fee waiver for papers lost during his transfer to another facility); Bansal, 2007 WL 551515, at *5 (observing that records needed to perfect appeal of requester's criminal conviction "primarily serves his

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alone, without a showing of a public benefit, is insufficient to warrant a fee waiver.¹⁴³

Additionally, agencies should evaluate the identity and qualifications of the requester -- e.g., his or her expertise in the subject area of the request and ability and intention to disseminate the information to the public -- in order to determine whether the public would benefit from disclosure to that requester.¹⁴⁴ Specialized knowledge may be required to

¹⁴²(...continued)

own interests"); Klein, 2006 U.S. Dist. LEXIS 32478, at *1, *12 (finding that plaintiff presented no evidence to show how records related to his suspension from practice before agency "would benefit anyone other than himself"); McQueen, 264 F. Supp. 2d at 525 (acknowledging that although plaintiff asserted more than one basis in support of fee waiver, his "primary purposes" served private interests and disqualified him on that basis alone); Mells v. IRS, No. 99-2030, 2002 U.S. Dist. LEXIS 24275, at *5-7 (D.D.C. Nov. 21, 2002) (noting that requester's reasons for fee waiver were "overwhelmingly personal in nature" where he claimed that disclosure "would yield exculpatory evidence pertaining to his criminal conviction"). But see Johnson v. DOJ, No. 89-2842, slip op. at 3 (D.D.C. May 2, 1990) (stressing that death-row prisoner seeking previously unreleased and possibly exculpatory information was entitled to partial fee waiver on rationale that potential "miscarriage of justice . . . is a matter of great public interest"), summary judgment granted, 758 F. Supp. 2, 5 (D.D.C. 1991) (holding that, ultimately, FBI not required to review records or forego FOIA exemption for possibly exculpatory information); see also Pederson v. RTC, 847 F. Supp. 851, 856 (D. Colo. 1994) (concluding that requester's personal interest in disclosure of requested information did not undercut fee waiver request when requester established existence of concurrent public interest).

¹⁴³ See, e.g., Brunsilius v. DOE, No. 07-5362, 2008 U.S. App. LEXIS 15314, at *2 (D.C. Cir. July 16, 2008) (per curiam) (emphasizing that "[a]ppellant's indigence and his private litigation interest are not valid bases for waiving fees under FOIA"); Ely v. USPS, 753 F.2d 163, 165 (D.C. Cir. 1985) ("Congress rejected a fee waiver provision for indigents."); Cotton, 2008 U.S. Dist. LEXIS 93149, at *1-2 (reiterating that Congress has "rejected fee waiver provision for indigents" and that fee waiver denials for records on self "will be upheld despite requester's indigence"); Emory v. HUD, No. 05-00671, 2007 WL 641406, at *4 (D. Haw. Feb. 23, 2007) (stating that order granting in forma pauperis status is not waiver of FOIA fee requirement in agency regulation); Bansal, 2007 WL 551515, at *6 (finding "no special provision" in statute for "reduced fees based on indigence or incarcerated status"); Rodriguez-Estrada v. United States, No. 92-2360, slip op. at 2 (D.D.C. Apr. 16, 1993) (explaining no entitlement to fee waiver on basis of in forma pauperis status under 28 U.S.C. § 1915 (2000)); see also S. Conf. Rep. No. 93-1200, at 8 (1974), reprinted in 1974 U.S.C.C.A.N. 6285, 6287 (proposed fee waiver provision for indigents eliminated; "such matters are properly the subject for individual agency determination in regulations").

¹⁴⁴ Compare Brunsilius, 2008 U.S. App. LEXIS 15314, at *2 (finding no entitlement to fee waiver where plaintiff failed to "demonstrate his ability to disseminate . . . to the general public"), Brown, 226 F. App'x at 868-69 (determining that requester's stated purpose of his website, its traffic, and attention it has received "do not establish that he . . . disseminates news to the public at large"), McClain, 13 F.3d at 221 (stating that fee waiver must be assessed in light of identity and objectives of requester), Larson, 843 F.2d at 1483 & n.5

(continued...)

Although representatives of the news media, as defined by the FOIA,¹⁴⁶ are not "automatically" entitled to a fee waiver¹⁴⁷ they are generally able to meet this aspect of the statutory requirement by showing their ability to disseminate information.¹⁴⁸ Other requesters may be asked to describe their expertise in the subject area and their ability and intention to disseminate the information if this is not evident from the administrative record.¹⁴⁹ (For a further discussion of news media requesters as defined by the OPEN Government Act, see Fee and Fee Waivers, Fees, Requester Categories, above.)

¹⁴⁵(...continued)

technical"); Eagle, 2003 WL 21402534, at *5 (granting fee waiver and emphasizing that agency ignored educational institution requester's intent to review, evaluate, synthesize, and present "the otherwise raw information into a more usable form"); S.A. Ludsin, 1997 U.S. Dist. LEXIS 8617, at *16 (finding requester's intention to make raw appraisal data available on computer network, without analysis, to be insufficient to meet public interest requirement); see also FOIA Update, Vol. VIII, No. 1, at 7 ("OIP Guidance: New Fee Waiver Policy Guidance"). But see FedCure, 602 F. Supp. 2d at 205 (explaining that any dissemination of "highly technical" information where none is currently available, "regardless of [requester's] plan for interpreting the information," will enhance public's understanding of it).

¹⁴⁶ 5 U.S.C. § 552(a)(4)(A)(ii)(III).

¹⁴⁷ See McClain, 13 F.3d at 221 (dictum) (concluding that status as newspaper or nonprofit institution does not lead to automatic waiver of fee); Hall, 2005 WL 850379, at *7 n.13 (noting that qualification as news media entity "would not automatically" entitle requester to public interest fee waiver).

¹⁴⁸ See FOIA Update, Vol. VIII, No. 1, at 8 & n.5 ("OIP Guidance: New Fee Waiver Policy Guidance"); see also Oglesby, No. 02-0603, slip op. at 5 (D.D.C. Sept. 3, 2002) (reiterating that member of news media presumptively meets dissemination factor).

¹⁴⁹ See Edmonds Inst., 460 F. Supp. 2d at 75 (finding that evidence of requester's past use of FOIA materials "can be relevant to a fee-waiver determination" but that there is no statutory or regulatory requirement that requester provide it); FOIA Update, Vol. VIII, No. 1, at 8 & n.5 ("OIP Guidance: New Fee Waiver Policy Guidance") ("Where not readily apparent to an agency, requesters should be asked to describe specifically their qualifications, the nature of their research, the purposes for which they intend to use the requested information, and their intended means of dissemination to the public."). Compare Oglesby, 920 F.2d at 66 n.11 (explaining that requester's assertion that he was writer and had disseminated in past, coupled with bare statement of public interest, was insufficient to meet statutory standard), with Carney, 19 F.3d at 815 (noting that while requester had only tentative book publication plans, "fact that he is working on a related dissertation is sufficient evidence . . . that his book will be completed"), S. Utah, 402 F. Supp. 2d at 87-88 (finding requester's specific examples of its involvement in area of cultural resources, including its submission of public comments about impact to such resources on federal land to federal agencies, publication of articles and reports, and use of archaeologists for its work, to be "sufficient evidence" of its expertise in field), and W. Watersheds, 318 F. Supp. 2d at 1038, 1040 (stating that where no evidence was presented that information sought was "highly technical," requester's past experience analyzing agency records was sufficient to demonstrate its ability to "process the information" and to present it to public in summarized form).

Additionally in this regard, while nonprofit organizations and public interest groups often are capable of disseminating information, they do not presumptively qualify for fee waivers; rather they must, like any requester, meet the statutory requirements for a full waiver of all fees.¹⁵⁰

Requesters who make no showing of how the information would be disseminated, other than through passively making it available to anyone who might seek access to it, do not meet the burden of demonstrating with particularity that the information will be communicated to the public.¹⁵¹

Fourth, the disclosure must contribute "significantly" to public understanding of government operations or activities.¹⁵² To warrant a waiver or reduction of fees, the public's

¹⁵⁰ See Forest Guardians, 416 F.3d at 1178 (reiterating that public interest groups "must still satisfy the statutory standard to obtain a fee waiver"); Sierra Club Legal Def. Fund, No. 93-35383, slip op. at 4 (9th Cir. Aug. 29, 1994) (explaining that status as public interest law firm does not entitle requester to fee waiver); McClain, 13 F.3d at 221 (stating that status as newspaper or nonprofit institution does not lead to "automatic" waiver of fee); McClellan, 835 F.2d at 1284 (stating that legislative history makes plain that "public interest" groups must satisfy statutory test); VoteHemp, 237 F. Supp. 2d at 59 (explaining that nonprofit status "does not relieve [the requester] of its obligation to satisfy the statutory requirements for a fee waiver"); Nat'l Wildlife Fed'n, No. 95-017-BU, slip op. at 3-4 (D. Mont. July 15, 1996) (finding that public interest groups must satisfy statutory test and that requester does not qualify for fee waiver by "basically" relying on its status "as one of the nation's largest" conservation organizations).

¹⁵¹ See, e.g., Van Fripp v. Parks, No. 97-0159, slip op. at 12 (D.D.C. Mar. 16, 2000) (emphasizing that placement in library amounts to, "at best, a passive method of distribution" that does not establish entitlement to fee waiver); Klamath Water Users Protective Ass'n, No. 96-3077, slip op. at 47 (D. Or. June 19, 1997) (finding placement in library insufficient in itself to establish entitlement to fee waiver); see also FOIA Update, Vol. VIII, No. 1, at 8 ("OIP Guidance: New Fee Waiver Policy Guidance") (advising agencies that such requests should be analyzed to identify particular person or persons who actually will use requested information in scholarly or other analytic work and then disseminate it to general public).

¹⁵² See 5 U.S.C. § 552(a)(4)(A)(iii); see also Stewart, 554 F.3d at 1244 (denying fee waiver where plaintiffs failed to demonstrate how search for documents not yet known to exist would "reveal additional or different information" than that already provided, stating that court could not determine "how such information would 'contribute significantly to public understanding'"); Brown, 226 F. App'x at 869 (finding that requester failed to explain how disclosure would be "likely to contribute significantly to public understanding"); Natural Res. Def. Council v. EPA, 581 F. Supp. 2d 491, 501 (S.D.N.Y. 2008) (stating that public's understanding of agency's decisionmaking "will be significantly enhanced by learning about the nature and scope of [agency] communications with commercial interests"; no allegation of agency impropriety by requester necessary); Bansal, 2007 WL 551515, at *5 (noting that records needed to perfect appeal of requester's criminal conviction insufficient basis on which to conclude that disclosure would contribute significantly to public understanding of government operations); FOIA Update, Vol. VIII, No. 1, at 8 ("OIP Guidance: New Fee Waiver

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understanding of the subject matter in question, as compared to the level of public understanding existing prior to the disclosure, must be likely to be enhanced by the disclosure to a significant extent.¹⁵³ Such a determination must be an objective one; agencies are not permitted to make separate value judgments as to whether any information that would in fact contribute significantly to public understanding of government operations or activities is "important" enough to be made public.¹⁵⁴

¹⁵²(...continued)

Policy Guidance"); cf. Cnty. Legal Servs., 405 F. Supp. 2d at 558-59 (while observing that neither statute nor agency's regulation provided guidance on "what constitutes a 'significant' contribution," other courts have considered "current availability" and "newness of information sought" under this factor).

¹⁵³ See Sierra Club Legal Def. Fund, No. 93-35383, slip op. at 4 (9th Cir. Aug. 29, 1994) (concluding that requester failed to explain how disclosure to it "would add anything to 'public understanding' in light of vast amount of material already disseminated and publicized"); Carney, 19 F.3d at 815 (observing that when requested records are readily available from other sources, further disclosure will not significantly contribute to public understanding); FedCure, 602 F. Supp. 2d at 205 (explaining that any dissemination of "highly technical" information where none is currently available, will enhance public's understanding of it); McDade v. EOUSA, No. 03-1946, slip op. at 9 (D.D.C. Sept. 29, 2004) (paraphrasing with approval agency's regulation that provides that "public's understanding of the subject after disclosure must be enhanced significantly when compared to level of public understanding prior to disclosure"), summary affirmance granted to agency, No. 04-5378, 2005 U.S. App. LEXIS 15259, at *1 (D.C. Cir. July 25, 2005); W. Watersheds, 318 F. Supp. 2d at 1039 n.2 (finding that significance factor was met where requester's statements that information sought either was not readily available or had never been provided to public were not contradicted in administrative record by agency); Judicial Watch, 185 F. Supp. 2d at 62 (finding that plaintiff failed to describe with specificity how disclosure of "these particular documents will 'enhance' public understanding 'to a significant extent'"); FOIA Update, Vol. VIII, No. 1, at 8 ("OIP Guidance: New Fee Waiver Policy Guidance"); cf. Forest Guardians, 416 F.3d at 1181-82 (acknowledging that significance of contribution to be made by "release of the records" at issue "is concededly a close question," and finding that requester "should get the benefit of the doubt" and therefore is entitled to fee waiver); Cnty. Legal Servs., 405 F. Supp. 2d at 559 (finding that extent to which requested information already is available, its newness, and whether request is pretext for discovery all were proper considerations in applying "significance factor" where agency's regulation did not address statutory provision); Pederson, 847 F. Supp. at 855 (finding that despite requesters' failure to specifically assert such significance, widespread media attention referenced in appeal letter sufficient to demonstrate information's significant contribution to public understanding).

¹⁵⁴ See 132 Cong. Rec. S14,298 (daily ed. Sept. 30, 1986) (statement of Sen. Leahy) (emphasizing that agencies should administer fee waiver provision in "an objective manner and should not rely on their own, subjective view as to the value of the information"); cf. Cnty. Legal Servs., 405 F. Supp. 2d at 560 (finding that agency's inference that requester's use of "information in advising clients suggests a litigious motive" was speculative given that requester's services include counseling as well as litigation and there was no evidence of any pending lawsuits against agency); FOIA Update, Vol. VIII, No. 1, at 8 ("OIP Guidance: New
(continued...)

Once an agency determines that the "public interest" requirement for a fee waiver has been met -- through its consideration of fee waiver factors one through four -- the statutory standard's second requirement calls for the agency to determine whether "disclosure of the information . . . is not primarily in the commercial interest of the requester."¹⁵⁵ In order to decide whether this requirement has been satisfied, agencies should consider the final two fee waiver factors -- factors five and six -- in sequence:

Accordingly, to apply the fifth factor an agency must next determine as a threshold matter whether the request involves any "commercial interest of the requester" which would be furthered by the disclosure.¹⁵⁶ A commercial interest is one that furthers a commercial, trade, or profit interest as those terms are commonly understood.¹⁵⁷ Information sought in furtherance of a tort claim for compensation or retribution for the requester is not considered to involve a "commercial interest."¹⁵⁸ Furthermore, not only profit-making corporations but also individuals or other organizations may have a commercial interest to be furthered by disclosure, depending upon the circumstances involved, in particular "the use to which [the requester] will put the information obtained."¹⁵⁹ Agencies may properly consider the

¹⁵⁴(...continued)
Fee Waiver Policy Guidance").

¹⁵⁵ 5 U.S.C. § 552(a)(4)(A)(iii).

¹⁵⁶ Id.; see FOIA Update, Vol. VIII, No. 1, at 9 ("OIP Guidance: New Fee Waiver Policy Guidance") (discussing analysis that is required to determine whether requester has commercial interest); see also VoteHemp, 237 F. Supp. 2d at 64 (citing to agency's regulation and noting that "agencies are instructed to consider 'the existence and magnitude' of a commercial interest").

¹⁵⁷ See OMB Fee Guidelines, 52 Fed. Reg. at 10,017-18 (defining "commercial interest"); cf. Pub. Citizen Health Research Group v. FDA, 704 F.2d 1280, 1290 (D.C. Cir. 1983) ("Information is commercial if it relates to commerce, trade, or profit.") (Exemption 4 context); Am. Airlines, Inc. v. Nat'l Mediation Bd., 588 F.2d 863, 870 (2d Cir. 1978) (defining term "commercial" in Exemption 4 as meaning anything "pertaining or relating to or dealing with commerce").

¹⁵⁸ See McClellan, 835 F.2d at 1285; Martinez v. SSA, No. 07-cv-01156, 2008 WL 486027, at *4 (D. Colo. Feb. 18, 2008) (restating that "claims for damages do not constitute commercial interest . . . when grounded in tort"); cf. Detroit Free Press, Inc. v. DOJ, 73 F.3d 93, 98 (6th Cir. 1996) (stating, in context of attorney fees, that "news interests should not be considered commercial interests" when examining commercial benefit to requester (quoting Fenster v. Brown, 617 F.2d 740, 742 n.4 (D.C. Cir. 1979))).

¹⁵⁹ OMB Fee Guidelines, 52 Fed. Reg. at 10,013; see FOIA Update, Vol. VIII, No. 1, at 9-10 ("OIP Guidance: New Fee Waiver Policy Guidance"); see also Research Air, Inc. v. Kempthorne, 589 F. Supp. 2d 1, 2, 10 (D.D.C. 2008) (finding that records pertaining to aircraft incident involving requester, who was president and sole owner of corporate plaintiff, would benefit his commercial interests); VoteHemp, 237 F. Supp. 2d at 65 (concluding that nonprofit organization, as advocate for free market in controlled substance, had commercial interest in requested records); cf. Critical Mass Energy Project v. NRC, 830 F.2d 278, 281 (D.C. Cir. 1987)

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requester's identity and the circumstances surrounding the request and draw reasonable inferences regarding the existence of a commercial interest.¹⁶⁰

When a commercial interest is found to exist and that interest would be furthered by the requested disclosure, an agency must assess the magnitude of such interest in order subsequently to compare it to the "public interest" in disclosure.¹⁶¹ In assessing the magnitude of the commercial interest, the agency should reasonably consider the extent to which the FOIA disclosure will serve the requester's identified commercial interest.¹⁶²

Lastly the agency must balance the requester's commercial interest against the identified public interest in disclosure and determine which interest is "primary."¹⁶³ A fee waiver or reduction must be granted when the public interest in disclosure is greater in magnitude than the requester's commercial interest.¹⁶⁴

¹⁵⁹(...continued)

(recognizing that entity's "non-profit status is not determinative" of commercial status) (Exemption 4 case).

¹⁶⁰ See FOIA Update, Vol. VIII, No. 1, at 9 ("OIP Guidance: New Fee Waiver Policy Guidance"); see also Martinez, 2008 WL 486027, at *3-4 (analyzing class action representatives' commercial interest in records regarding amount paid by federal government to state government as reimbursement to class members, to include legal fees awarded to members, and concluding that it did not constitute "an interest in commerce, trade or profit"); VoteHemp, 237 F. Supp. 2d at 65 ("reiterating defendants' argument that plaintiff's website had "direct links to the websites of companies that sell hemp products" and solicit donations to "the industry's legal effort," and concluding that "plaintiff has a commercial interest in the information it is seeking"); cf. Tax Analysts v. DOJ, 965 F.2d 1092, 1096 (D.C. Cir. 1992) (clarifying that in context of attorney fees, status of requester as news organization does not "render[] irrelevant the news organization's other interests in the information").

¹⁶¹ See FOIA Update, Vol. VIII, No. 1, at 9 ("OIP Guidance: New Fee Waiver Policy Guidance").

¹⁶² See id.; see also VoteHemp, 237 F. Supp. 2d at 65 ("A review of plaintiff's Web site pages demonstrates that indeed it has a commercial interest in the information it is seeking to obtain.").

¹⁶³ See 5 U.S.C. § 552(a)(4)(A)(iii) (providing that disclosure cannot be "primarily in the commercial interest of the requester"); see Research Air, Inc., 589 F. Supp. 2d at 3, 10 (finding that requester's use of documents to challenge suspension of pilot's card was "primarily to benefit [requester's] commercial interests"); VoteHemp, 237 F. Supp. 2d at 65-66 (noting that agency "should consider the primary interest in disclosure," and concluding that while "[t]he private, commercial benefit to [requester] is clear[, t]he public benefit, however, is not" (quoting S.A. Ludsin & Co. v. SBA, No. 96-2146, 1997 WL 337469, at *7 (S.D.N.Y. June 19, 1997))); FOIA Update, Vol. VIII, No. 1, at 9 ("OIP Guidance: New Fee Waiver Policy Guidance").

¹⁶⁴ See Consumers' Checkbook, 502 F. Supp. 2d at 89 (finding that while requester charges fees, this "does not outweigh the advancement of the public interest here," taking into
(continued...)

that a full waiver is appropriate.¹⁶⁹

Because the statutory standard speaks to whether "disclosure" of the responsive information will significantly contribute to public understanding,¹⁷⁰ an analysis of the foregoing factors routinely requires an agency to first assess the nature of the information likely to be released in response to an access request. This assessment necessarily focuses on the information that would be disclosed,¹⁷¹ which in turn logically requires an estimation of the applicability of any relevant FOIA exemption(s).

The question of whether an agency should be required to establish the precise contours of its anticipated withholdings at the fee waiver determination stage was raised during the late 1980s in Project on Military Procurement v. Department of the Navy.¹⁷² There the district court suggested that an agency submit an index pursuant to the requirements of Vaughn v. Rosen¹⁷³ to defend the denial of a fee waiver based on anticipated application of FOIA exemptions.¹⁷⁴

¹⁶⁸(...continued)

case involving in excess of 80,000 pages of responsive records, seventy-percent fee waiver granted by agency); cf. Campbell, 164 F.3d at 35-37 (finding, where agency awarded partial fee waiver, that it had not carried its burden in denying waiver for public domain, repetitious, and administrative information in files, remanding for agency to "recalculate its fee waiver ratio" but specifically "declin[ing] to hold" that FBI cannot charge any copying fee").

¹⁶⁹ See Schoenman, 604 F. Supp. 2d at 191 (D.D.C. 2009) (finding that "the presence of administrative material within files that also contain substantive documents does not justify charging fees for the non-substantive clutter" (quoting Campbell, 164 F.3d at 36)); Schrecker, 970 F. Supp. at 50-51 (granting full fee waiver where agency provided no "strong evidence" that portion of requested information already was in public domain).

¹⁷⁰ 5 U.S.C. § 552(a)(4)(A)(iii); see also, e.g., DOJ Fee Waiver Regulation, 28 C.F.R. § 16.11(k)(2).

¹⁷¹ See Hall, 2005 WL 850379, at *7 (reiterating that FOIA fee waiver provision is applicable to "properly disclosed documents"); Judicial Watch, 2000 WL 33724693, at *5 (explaining that "under the FOIA, the [fee waiver] analysis focuses on the subject and impact of the particular disclosure"); Van Fripp, No. 97-159, slip op. at 10 (D.D.C. Mar. 16, 2000) (stating that "reviewing agencies and courts should consider . . . whether the disclosable portions of requested information are meaningfully informative in relation to the subject matter requested" (citing agency's fee waiver regulation)).

¹⁷² 710 F. Supp. 362, 366-68 (D.D.C. 1989).

¹⁷³ 484 F.2d 820, 826-28 (D.C. Cir. 1973).

¹⁷⁴ See 710 F. Supp. at 367 n.11 (noting that government "may be correct" that fee waiver determination depends in part on applicability of FOIA exemptions to responsive records, and stating that it "suggested that defendant [either] submit a Vaughn Index or . . . produce the documents it seeks to withhold for in camera inspection" so that court could "determine both the nondisclosure and fee waiver issues").

Since Project on Military Procurement, several district court opinions have concluded that fee waiver requests should not take into consideration the fact that records may ultimately be found to be exempt from disclosure.¹⁷⁵ Additionally, the majority of these opinions specify that a fee waiver request should be evaluated "on the face of the request."¹⁷⁶ The fee waiver provision, however, authorizes agencies to waive or reduce fees when "disclosure of the information is likely to contribute significantly to the public's understanding of government operations" (emphasis added).¹⁷⁷

The FOIA does not explicitly reference any time period within which an agency must resolve a fee waiver issue.¹⁷⁸ The statutory twenty-working day time period to respond to a request has been applied to resolution of fee waiver (and fee) issues by several courts,

¹⁷⁵ See Carney, 19 F.3d at 815 (finding that agency's denial of fee waiver was not proper when made simply on basis that requested records "may [be] exempt from disclosure . . . , [because a] fee waiver should be evaluated based on the face of the request and the reasons given by the requester" (citing Project on Military Procurement, 710 F. Supp. at 367)); Citizens for Responsibility & Ethics in Wash. v. DOJ, 602 F. Supp. 2d 121, 125 (D.D.C. 2009) ("Fee-waiver requests are [not] evaluated . . . on the possibility of eventual exemption from disclosure.") (citations omitted); Ctr. for Medicare Advocacy, 577 F. Supp. 2d at 241 (fee waiver decision should not be based on "possibility that the records may ultimately be determined to be exempt from disclosure" (quoting Judicial Watch, Inc. v. DOT, No. 02-566, 2005 WL 1606915, at *4 (D.D.C. July 5, 2005))) (remaining citations and quotations omitted); Ctr. for Biological Diversity, 546 F. Supp. 2d at 729 (rejecting agency's rationale for fee waiver denial based on its argument that "given its unique role as a deliberative agency that advises the President about proposed regulations makes this the rare case" when responsive documents were "patently exempt" from disclosure); S. Utah, 402 F. Supp. 2d at 90 (deciding that agency cannot base fee waiver decision on anticipated redactions to responsive records); Judicial Watch, 2005 WL 1606915, at *4 (stating that fee waiver decision should not be made on basis of agency's "determination that most of the information was exempt from disclosure"); Judicial Watch, 310 F. Supp. 2d at 295 (same); Wilson v. CIA, No. 89-3356, slip op. at 3-4 (D.D.C. Mar. 25, 1991) (stating that agency may not deny fee waiver request based upon "likelihood" that information will be withheld); cf. Schoenman, 604 F. Supp. 2d at 190-91 (finding that agency improperly concluded that "certain records are not qualified for a fee waiver because they contain exempt material," rejecting defendants' distinction between asserted exemptions for records already processed as in instant case and "anticipated" exemptions, stating that "this distinction is not one that courts have necessarily relied on").

¹⁷⁶ See, e.g., Carney, 19 F.3d at 815 (finding that "fee waiver should be evaluated based on the face of the request and the reasons given by the requester" (citing Project on Military Procurement, 710 F. Supp. at 367)); Citizens for Responsibility & Ethics in Wash., 602 F. Supp. 2d at 125 (emphasizing that "[f]ee-waiver requests are evaluated based on the face of the request") (citations omitted); Ctr. for Medicare Advocacy, 577 F. Supp. 2d at 241 (same) (quoting Judicial Watch, 2005 WL 1606915, at *4)); Ctr. for Biological Diversity, 546 F. Supp. 2d at 730 (finding that fee waiver "should be evaluated based on the face of the request and the reasons given by the requester" (quoting Carney, 19 F.3d at 815)).

¹⁷⁷ See 5 U.S.C. § 552(a)(4)(A)(iii).

¹⁷⁸ See 5 U.S.C. § 552(a)(4)(A).

As part of the Freedom of Information Reform Act of 1986,¹⁸³ a specific judicial review provision for fee waivers was added to the FOIA,¹⁸⁴ which provides for the review of agency fee waiver denials according to a de novo standard, yet explicitly provides that the scope of judicial review remains limited to the administrative record established before the agency.¹⁸⁵ Thus, courts have not permitted either party to supplement the record or offer new argument or rationale for seeking a fee waiver or for denying such a request.¹⁸⁶

An agency's belated grant of a fee waiver, however, can render moot a requester's

¹⁸³ Pub. L. No. 99-570, 100 Stat. 3207.

¹⁸⁴ See 5 U.S.C. § 552(a)(4)(A)(vii).

¹⁸⁵ See *id.*; see also Stewart, 554 F.3d at 1241 (reiterating that review of agency's fee waiver decision is de novo "and is limited to the record before the agency"); Judicial Watch, 326 F.3d at 1311 (same); Carney, 19 F.3d at 814 (same); Schoenman, 604 F. Supp. 2d at 188 (same); Manley, 2008 WL 4326448, at *2 (same); Brown, 445 F. Supp. 2d at 1353 (same); Cnty. Legal Servs., 405 F. Supp. 2d at 555 (same); W. Watersheds, 318 F. Supp. 2d at 1039 (same); Inst. for Wildlife Prot., 290 F. Supp. 2d at 1228 (same); McQueen, 264 F. Supp. 2d at 424 (same); *cf.* Physicians Comm. for Responsible Med., 480 F. Supp. 2d at 121 n.2 (dismissing separate challenge to fee waiver denial brought under APA's arbitrary and capricious standard, emphasizing that FOIA provides adequate remedy); Eagle, 2003 WL 21402534, at *2, *4 (stating that Court reviews fee waiver decisions de novo; acknowledging that agency ordinarily is not permitted "to rely on justifications for its decision that were not articulated during the administrative proceedings" but finding that here agency was "simply clarifying and explaining" its earlier position).

¹⁸⁶ See, e.g., Friends of the Coast Fork, 110 F.3d at 55 (reiterating that agency's letter "must be reasonably calculated to put the requester on notice" as to reasons for fee waiver denial); Larson, 843 F.2d at 1483 (information not part of administrative record may not be considered by district court when reviewing agency fee waiver denial); Manley, 2008 WL 4326448, at *3 (concluding that when agency administratively determined that plaintiff's request met factor one, it could not raise "post hoc rationalization . . . to deny plaintiff's request on this first factor" during litigation); Physicians Comm. for Responsible Med., 480 F. Supp. 2d at 121 n.1 (disallowing plaintiff's submission of affidavit that was not part of administrative record); Citizens for Responsibility & Ethics in Wash., 481 F. Supp. 2d at 107 n.1 (refusing to take into account material submitted by both parties that were not before agency when administrative appeal considered); Brown, 445 F. Supp. 2d at 1354 (observing that "administrative record should consist of those documents which [agency] used to determine whether Plaintiff's fees should be waived"); Pub. Citizen, 292 F. Supp. 2d at 5 (criticizing agency for its failure to adjudicate fee waiver by emphasizing that "this Court has no record upon which to evaluate plaintiff's claims that it is entitled to a waiver"); see also Ctr. for Pub. Integrity v. HHS, No. 06-1818, 2007 WL 2248071, at *5 (D.D.C. Aug. 3, 2007) (noting that "mere inclusion" of web address in request insufficient to include all information on website as part of administrative record) (requester category context); FOIA Update, Vol. VIII, No. 1, at 10 ("OIP Guidance: New Fee Waiver Policy Guidance"); FOIA Update, Vol. VI, No. 1, at 6 ("OIP Guidance: FOIA Counselor) (answering question of whether agency can supplement its rationale for denying fee waiver after requester files suit).

